SUPREME COURT, U.S.
JUL 22 1974

APPENDIX

Supreme Court of the United States

October Term, 1973

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 2, 1974

CERTIORARI GRANTED MAY 28, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Docket Entries	1
Request for Declaratory Ruling Respecting New Jersey State Lottery, filed by Jersey Cape Broadcasting Corp., dated February 18, 1971	6
Declaratory Ruling, FCC 71-722, adopted July 14, 1971	8
Public Notice, Broadcast of Lottery Information, FCC 71-763, released July 27, 1971	12
Petition for Reconsideration of Declaratory Ruling, FCC 71-722, and covering letter, dated August 16, 1971, filed by Attorney General, State of New Jersey	13

Page

*Memorandum Opinion and Order, released July 27, 1972 ..... Pet. App. 13a

*Opinion of the United States Court of Appeals for the Third Circuit, filed January 2, 1974 ... Pet. App. 1a

*Judgment on Rehearing, dated January 2, 1974 Pet. App. 11a

Order of the Supreme Court granting certiorari, dated May 28, 1974 15

---

*Not reprinted in Joint Appendix. Citations are to appendix of Petition for Writ of Certiorari.

DATE 1972	FILINGS—PROCEEDINGS	Filed

Sep. 25—Petition for Review of an Order of the Federal Communications Commission, rec'd, filed (6) copies
Affidavit of service of above petition, filed.
Copy of Petition for Review mailed to Secretary of F.C.C.
Copy of Petition for Review mailed to Attorney General of the United States.

Oct. 5—Appearance of Richard M. Conley, Esq. for petitioner New Jersey State Lottery Commission, filed.

Oct. 6—Appearance of Joseph A. Marino, Esq. for respondent F.C.C., filed.

Oct. 10—Appearance of Howard E. Shapiro, Esq. for respondent United States, filed.

Oct. 11—Appearance of Charles M. Firestone, Esq. for respondent F.C.C., filed.

Oct. 11—Appearance of John W. Pettit, Esq. for respondent F.C.C., filed.

Oct. 24—Motion by Commonwealth of Pennsylvania for leave to intervene, filed. (4 cc.). Certificate of service attached.

Oct. 24—Motion by the State of New Hampshire for leave to intervene, filed. (4 cc.) Certificate of service in motion.

Nov. 6—Certified list in lieu of the entire record, rec'd. and filed. (2 copies).

Nov. 6—Motion by the State of New York for leave to intervene, filed. (4 copies). Certificate of service attached.

Nov. 10—Motion by State of New York for leave to file motion for leave to intervene out of time, filed. (4 cc.). Certificate of service attached.

Nov. 13—Submitted on motion by Commonwealth of Pennsylvania and motion by State of New Hampshire for leave to intervene. Coram: Aldisert, Gibbons and Hunter.

Nov. 13—Opposition by respondent, F.C.C., to motions for leave to intervene by the State of New Hampshire, Commonwealth of Penna. and State of New York, filed. (4 cc.) Certificate of service attached.

Nov. 15—Order (*Aldisert*, Gibbons and Hunter) granting motions by Commonwealth of Pennsylvania and State of New Hampshire for leave to intervene, filed.

Nov. 15—Appearance of David H. Souter, Esq. for intervenor, State of New Hampshire, filed.

Nov. 22—Appearance of Raymond Keiman, Esq. for intervenor, Commonwealth of Pennsylvania, Bureau of State Lotteries, filed.

Nov. 27—Reply of The State of New York to Opposition by respondent, Federal Communications Commission, to motion to intervene, received (4 cc.) Certificate of service attached.

Nov. 27—Submitted on motions by The State of New York for leave to intervene and for leave to file a motion for leave to intervene out of time. Coram: McLaughlin and Adams.

Dec. 4—Order (*McLaughlin* and Adams) denying motions by the State of New York for leave to intervene and for leave to file a motion to intervene out of time, filed.

Dec. 4—CC of above order to C of D.C.

Dec. 15—Consent motion by petitioner, with affidavit in support, for leave to extend time for filing brief and appendix to and including January 15, 1973, filed. (4 cc.). Proof of service in letter dated December 14, 1972.

Dec. 21—Above consent motion granted. NO FURTHER EXTENSIONS. *Clerk*.

Dec. 18—Motion by intervenor, Commonwealth of Pennsylvania, for leave to extend time for filing brief to January 15, 1973, filed. (4 cc.). Affidavit of service attached.

Dec. 27—Submitted on above motion by intervenor. *Clerk.*

DATE 1973	FILINGS—PROCEEDINGS	Filed

Jan. 3—Order (Clerk) granting motion by Intervenor, Commonwealth of Pennsylvania, for leave to extend time to file brief to January 15, 1973, filed.

Jan. 12—Brief for Intervenor, Commonwealth of Pennsylvania, filed. Certificate of service by mail on January 11, 1973, attached.

Jan. 15—Appendix, rec'd. and filed.

Jan. 15—Affidavit of service of appendix by mail on January 12, 1973, filed.

Jan. 15—Brief for petitioner (New Jersey State Lottery Commission, rec'd January 17, 1973, filed. (25 cc.). Affidavit of service by mail on January 15, 1973 attached to brief.

Jan. 13—Statement of intervenor, the State of New Hampshire, concurring in the positions taken by New Jersey in that brief, and believes no purpose would be served by New Hampshire's filing a further brief; therefore New Hampshire submits this statement in lieu of brief, filed. (25 copies). Certificate of service attached.

Jan. 17—Motion by The Maryland Public Broadcasting Commission for leave to file brief as amicus curiae, filed. (4 copies). Consent of counsel for all parties attached.

Jan. 15—Brief as amicus curiae of the Maryland Public Broadcasting Commission, in support of the position of the petitioner, filed. Certificate of service by mail on Jan. 15, 1973 attached.

Mar. 5—Motion by respondent, Federal Communications Commission, for leave to file brief out of time, filed. (4 copies). Certificate of service attached.

Mar. 9—Motion by petitioner for acceleration of oral argument on appeal, in which it states that counsel for respondents have indicated that they do not intend to oppose this motion, filed. (4 cc.) Proof of mailing in letter dated March 7, 1973.

Mar. 13—Submitted on above motion. CLERK

Mar. 13—Order (CLERK) granting motion by respondent, Federal Communications Commission, for leave to file brief out of time, filed.

Mar. 13—Brief for respondent, Federal Communications Commission, rec'd. March 5, 1973, filed.

Mar. 13—Certificate of service of respondent's brief by mail on March 1, 1973, filed.

Mar. 20—Submitted on above motion. Clerk.

Mar. 21—Order (CLERK) granting petitioner's motion for acceleration of oral argument on appeal and this case will be listed for disposition on the merits at the earliest convenience of the Court, filed.

May 3—Letter dated May 3, 1973 enclosing opinion and order of the F.C.C. concerning New York City's Off-Track Betting Corp., received for the information of the Court from Alfred L. Nardelli, Esq. (4 cc.). Certificate of service attached.

May 15—Argued. Coram: Van Dusen, Gibbons and Rosenn.

Sept. 18—Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons*, Rosenn, Hunter, Weis and Garth, C. J.) that the Clerk of this Court list the above case for rehearing before the court en banc at the convenience of the Court, filed.

Oct. 4—Order dated October 3, 1973 (Seitz, J.) directing case be listed for rehearing en banc without oral argument, filed.

Nov. 15—ReSubmitted en banc. Coram: Seitz, Chief Judge and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges.

DATE 1974	FILINGS—PROCEEDINGS	Filed

Jan. 2—Opinion of the Court (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, *Gibbons*, Rosenn, Hunter, Weis and Garth, Circuit Judges), filed.

Jan. 2—Judgment granting the petition for review; reversing the order of the Commission, filed July 27, 1972, with costs taxed in favor of petitioner, filed.

Jan. 14—Bill of costs for petitioner, filed. service in letter of 1/11/74

Jan. 17—Motion by respondent for Stay of Mandate, filed.

Jan. 21—Order (Gibbons, Circuit Judge) staying the issuance of the mandate until February 15, 1974, filed.

Jan. 24—Motion by petitioner for reconsideration and Vacation of order staying mandate, and Brief in Support thereof, rec'd, filed. (10 copies) service attached.

Feb. 1—Order (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, *Gibbons*, Rosenn, Hunter Weis and Garth, Circuit Judges) denying motion by petitioner for reconsideration and vacation of order staying mandate, filed.

Feb. 19—Certified judgment in lieu of formal mandate issued.

Feb. 19—Record released to secretary of F.C.C.

Mar. 1—Receipt for release of record rec'd from Secretary of F.C.C., filed.

Apr. 5—Notice of filing (on April 2, 1974) of petition for writ of certiorari, rec'd from Clerk of S.C., filed. (S.C. No. 73-1471).

Jun 5—Certified copy of order dated May 28, 1974 rec'd from Clerk of the Supreme Court granting the petition for writ of certiorari, filed. (S.C. No. 73-1471)

Request for Declaratory Ruling Respecting New Jersey State Lottery, filed by Jersey Cape Broadcasting Corp., Dated February 18, 1971

Attorneys and Counsellors at Law
1830 Jefferson Place, N.W.
Washington, D.C. 20036

295-8900

Harry J. Daly
Leonard S. Joyce
George R. Borsari, Jr.
Thomas J. Downs
Francis X. Welch

133 S. La Salle Street
Chicago 3, Illinois
Franklin 2-1056

475 Fifth Avenue
New York City
Lexington 2-2762

February 18, 1971

Received
Feb 18, 1971
F.C.C.

Office of the Secretary

The Honorable Ben F. Waple, Secretary
Federal Communications Commission
Washington, D.C.

Jersey Cape Broadcasting Corporation
Station WCMC-AM-FM-TV
Wildwood, New Jersey

Request for Declaratory Ruling
Respecting New Jersey State Lottery

Sir:

Request is hereby made on behalf of the licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey for a declaratory ruling by the commission as to whether or not

the announcement of the winning number of the state lottery, each week, would constitute a violation of 18 USC § 1304, or Commission Rules or policies, respecting lotteries.

The facts are these. On Thursday morning, each week, a representative of the state of New Jersey draws one multi-digited number as the winning lottery number for the week. The person having the exact number wins the grand prize; other persons having some of the digits win lesser prizes. Approximately 11:30 A.M. each Thursday Stations WCMC-AM-FM-TV are advised of the winning number via its Associated Press teletype machine.

It has become known to area residents that the station does become aware of the winning number shortly after it is drawn, and, each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number. The licensee understands that area newspapers and state agencies are bombarded with telephone inquiries, also. All have attempted to discourage such calls. The newspapers in the area publish the winning number, but not until late afternoon or the next morning.

It is proposed that Station WCMC-AM-FM-TV be permitted during regular newscasts to broadcast the following statement:

> "The winning state lottery number drawn today is (and then recite the winning number)."

There would be no further comment whatever either during that newscast or thereafter. It is proposed that the station broadcast the winning number on three consecutive newscasts commencing at 12:00 noon on Thursday, only.

It is respectfully submitted that the proposed broadcasts would not constitute a lottery. The United States Court of Appeals for the Second Circuit, in the New York State Broadcasters Association, Inc. v. United States of America, 414 F2d 990 held that 18 U.S.C § 1304 prohibited, only, information that "directly promote a lottery," but that a bona fide news story is not barred despite the fact that the news has an "incidental effect" of promoting a lottery.

In the above set of circumstances it is submitted that the prime effect of the broadcast would be to inform the listening public of a legitimate news item about which they have a keen interest, and, that only "incidently" is there any promotion of a lottery. To permit such broadcasts on the one hand would inform the public and on the other hand eliminate scores of telephone calls to local news agencies and government officials, which considering all the circumstances would be consistent with the laws of the United States and would serve the public interest, convenience, and necessary.

Very truly yours,

LEONARD S. JOYCE
Leonard S. Joyce
Counsel for Jersey Cape
Broadcasting Corporation

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 71-722

63861

In the Matter of
Jersey Cape Broadcasting
Corporation

Declaratory Ruling

Adopted: July 14, 1971; Released: July 20, 1971

By the Commission: Commissioners Robert E. Lee and Wells absent; Commissioner Johnson concurring in the result.

1. This matter concerns a request for declaratory ruling filed February 18, 1971, by Jersey Cape Broadcasting Corporation (hereinafter Jersey Cape), licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey, with respect to the following described situation:

> Jersey Cape is desirous of broadcasting weekly on its above stations, the winning New Jersey state lottery

number. Each Thursday morning, a state official draws one multi-digited number as the winning New Jersey state lottery number for the week. Although local newspapers publish the winning number, such publications are not available generally until late afternoon or the next morning. The winning number is received by Jersey Cape's stations at approximately 11:30 a.m. each Thursday on a news service teletype. Jersey Cape states that area residents have become aware of the station's early receipt of the winning number, and that "each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number." Jersey Cape "understands that area newspapers and state agencies are deluged by similar telephone inquiries, also."

2. Jersey Cape proposes to alleviate the above situation by broadcasting each Thursday only, during three consecutive regular newscasts commencing at 12:00 noon, the following statement:

"The winning state lottery number drawn today is (and then recite the winning number)."

No further comment would accompany the statement.

3. Jersey Cape submits that broadcasting the above recited statement would not constitute a violation of 18 U.S.C. § 1304[1] or of the Commission's Rules respecting lotteries.[2] It asserts that the case of *New York State*

[1] 18 U.S.C. § 1304 reads as follows:

Broadcasting lottery information.

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than $1,000 or imprisoned not more than one year or both. Each day's broadcasting shall constitute a separate offense.

[2] The applicable Commission Rules, Section 73.122 (AM), 73.292 (FM) and 73.656 (TV), are patterned after the statute.

Broadcasters Association, Inc. v. *United States of America*, 414 F.2d 990 (2nd Cir. 1969), supports its position by holding that 18 U.S.C. § 1304 prohibits only program materials which "directly promote a lottery," but that a bona fide news story is not barred despite the news having an "incidental effect" of promoting a lottery. Jersey Cape contends that in the present situation, "the prime effect of the broadcast would be to inform the listening public of a legitimate news item about which they have a keen interest, and that only incidentally is there any promotion of a lottery."

4. *The New York State* case does not, in our view, support Jersey Cape's position. While the Court recognized, at 414 F.2d 998, the distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply "news" of a lottery (not prohibited), it did not define "direct promotion of a lottery." Accordingly, for specific guidance to broadcasters, it remanded the case to the Commission to apply its expertise to the problem.

5. Subsequently, the Commission released, on March 2, 1970, a *Supplemental Declaratory Ruling*, 21 FCC 2d 846, which adequately serves as a basis for the response to the request now before us. Ten specific hypothetical situations were dealt with, and for each case a conclusion was reached as to whether broadcasts would be prohibited. It was there declared that although broadcasting legitimate news stories concerning lotteries is permitted, certain types of items, which may be said to interest some listeners and thus have some limited news value, do so directly promote a lottery as to be prohibited from being broadcast. Into this category were placed items, clearly comparable to the proposal before us, such as "Announcements (unpaid) of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed." Bona fide news announcements of the persons winning the top prizes, of interest to the public generally, are protected by the First Amendment, but not a long list of winners. The instant proposal does not concern announcements of persons who

have won but rather the publicizing of the "winning number," the widespread dissemination of such information being reasonably necessary or helpful to the conduct of the lottery,[3] and of interest only to that limited class of people who actually hold tickets.[4]

6. For these reasons, the proposed broadcast would be, in our view, a violation of 18 U.S.C. § 1304 and the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Secretary

---

[3] Some years ago, upon disclosure that the announcement of the daily U.S. Treasury balance was being used to establish and announce the winning number in the "numbers game," leading metropolitan newspapers immediately discontinued the printing of this figure.

[4] The lottery prohibition is a criminal statute in Title 18 of the U.S. Code and, as the Supreme Court held in *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954), the authority of the Commission with respect to its application is concurrent with that of the Department of Justice. In view of this, Commission action in this area is coordinated with the Department of Justice, and this procedure has been followed with respect to this proceeding.

Public Notice, Broadcast of Lottery Information, FCC 71-763, released July 27, 1971

PUBLIC NOTICE
Federal Communications Commission—1919 M Street, NW
Washington, D. C. 20554

FCC 71-763—66155
July 27, 1971—B

BROADCAST OF LOTTERY INFORMATION

It has been brought to the attention of the Commission that certain licensees and/or news services may be misinterpreting the declaratory ruling (FCC 71-722) handed down by the Commission on July 14, 1971, which concerned the broadcast of the winning New Jersey State lottery number.

The ruling was given in response to a request for a declaratory ruling made by Jersey Cape Broadcasting Corporation in which it was stated that the winning numbers would be announced on news programs. The Commission stated that such broadcasting of winning New Jersey State lottery numbers was prohibited by 18 U.S.C. § 1304 and Commission regulations.

The Commission noted that the proposed broadcast of the winning lottery numbers was of interest only to that limited class of persons who actually hold tickets and did not have the general news interest of announcements of the names of persons who have won.

The Commission's ruling appears to have been interpreted in some quarters as holding that winning numbers may be broadcast if they are given as part of a news item. All licensees and other interested persons should note that this is not a correct interpretation of the ruling, and that the Commission considers such announcement of winning lottery numbers to be prohibited by the statute and its rules.

Action by the Commission July 23, 1971. Commissioners Bartley, Robert E. Lee, Johnson and H. Rex Lee.

Petition for Reconsideration of Declaratory Ruling, FCC 71-722, and Covering Letter, Dated August 16, 1971, Filed By Attorney General, State of New Jersey

GEORGE F. KUGLER, JR.
Attorney General of New Jersey
Attorney for New Jersey
Lottery Commission
State House Annex
Trenton, New Jersey 08625
By: Philip I. Kagan
Deputy Attorney General
609/292-6567

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of Jersey)
Cape Broadcasting Corporation)

Petitioner, New Jersey Lottery Commission, by way of a Petition for Re-Consideration says:

1. On February 18, 1971, Jersey Cape Broadcasting Corporation, an FCC licensee, WCMC-AM-FM TV, requested a declaratory ruling on whether a broadcast of a particular news item would be violative of 18 U.S.C. § 1304 and Commission's Rules. The item is as follows:

> "The winning state lottery number drawn today is (and recite the winning number)."

2. On July 20, 1971 the Commission released a declaratory ruling, FCC 71-722, 63861, concluding that the proposed broadcast would be in violation of 18 U.S.C. § 1304 and the Commission's Rules.

3. This petitioner was not a party to the original request by Jersey Cape Broadcasting Corporation. It had no opportunity to intervene therein as it had no notice or knowledge of said request.

4. Had this petitioner been a party to the original request, certain statistical surveys would have been made available to the Commission. Said surveys show that on a weekly basis approximately *2.75* million people pur-

chase New Jersey State Lottery tickets within the State of New Jersey. This class represents approximately 58% of the adult population of the State of New Jersey (N.J. S.A. 5:9-15 prohibits the sale of lottery tickets to anyone under the age of 18 years). As such, this major segment of the population is vitally interested in the proposed news item.

5. The conclusion of the Commission that the proposed news item is of interest to a "limited class of people" and therefore of limited news value is erroneous because of the above.

6. The proposed news item is of significant news value and if it promotes the New Jersey State Lottery, it does so in an incidental manner.

7. The effect of the aforementioned ruling it to preclude the petitioner from communicating a legitimate news item to a major segment of the citizens of the State of New Jersey through the broadcasting news media.

8. Therefore, this petitioner is aggrieved and adversely affected within the meaning of 47 U.S.C. § 405 by the aforementioned declaratory ruling.

9. The original ruling by reason of the erroneous conclusion is in violation of rights guaranteed by the Constitution of the United States and contrary to the holding of the court in the case of *N. Y. Broadcasters Assn., Inc.* v. *U. S. of America*, 414 F.2d 990 (2nd Cir. 1969).

Wherefore:

The petitioner respectfully requests a re-consideration of the aforementioned ruling in order to present to the Commission its factual evidence and legal arguments.

Respectfully submitted,

GEORGE F. KUGLER, JR.
Attorney General of New Jersey

By: PHILIP I. KAGAN
Philip I. Kagan
Deputy Attorney General

SUPREME COURT OF THE UNITED STATES

No. 73-1471

UNITED STATES, ET AL., *Petitioners,*

v.

NEW JERSEY STATE LOTTERY COMMISSION

Order Allowing Certiorari

Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE 1974—552-423/P. O. 297